Filed 2/18/09 Dietz v. Healthmarkets USA CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHELE DIETZ, Plaintiff and Appellant, v. HEALTHMARKETS USA et al., Defendants and Respondents.	B204765 (Los Angeles County Super. Ct. No. BC371837)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joanne O'Donnell, Judge Presiding. Affirmed in part and reversed in part.

Stuart Law Firm, Antony Stuart; Law Offices of George A. Gallegos, George A. Gallegos; Kiesel Boucher Larson and E. Glenn Anaiscourt for Plaintiff and Appellant.

Law Offices of Jeffrey H. Ochrach and Jeffrey H. Ochrach for Defendant and Respondent Harold Wilson.

Munger, Tolles & Olson and Robert L. Dell Angelo for Defendant and Respondent Specialized Association Services.

Pfeiffer Thigpen & Fitzgibbon, Jon Pfeiffer, Kimberly L. Thigpen and Thomas N. Fitzgibbon for Defendant and Respondent National Association for the Self-Employed.

Sheppard, Mullin, Richter & Hampton, Andre J. Cronthall, Fred R. Puglisi and Catherine La Tempa for Defendants and Respondents The Mega Life and Health Insurance Co., HealthMarkets, Inc. and HealthMarkets Lead Marketing Group, Inc.

Brown, White & Newhouse, Thomas M. Brown, Kenneth P. White and Alfredo X. Jarrin for Defendants and Respondents Phil Quinn, Quinn Division, David Mack, and Mack Region.

Relying on representations by licensed insurance agent Harold Wilson, plaintiff Michele Dietz joined the National Association of the Self-Employed (NASE) and purchased health insurance from Mega Life and Health Insurance Company (Mega). After most of her claims for medical expenses under the Mega policy were denied, Dietz sued 11 individuals and entities on various legal theories. The trial court granted motions by four out-of-state defendants to quash service of the summons and complaint,[1] sustained demurrers without leave to amend as to the remaining seven defendants,[2] and dismissed the complaint. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Allegations of the Complaint

On May 18, 2004, Wilson met Dietz in her home and advised he represented NASE, which offered group health insurance coverage to self-employed individuals. Dietz explained "she wanted comprehensive coverage that would protect her and her son." Her son had a pre-existing eye condition and, as a single mother, she "did not want to be faced with medical bills." In response, Wilson launched into a sales presentation with charts and graphs to demonstrate "how perfectly" the Subject Policy would meet her needs.

Based on Wilson's representations, Dietz joined NASE and applied for the policy. Mega accepted Dietz's application and issued policy no. 09054061077.

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[1] The out-of-state defendants were: HealthMarkets USA, also known as HealthMarkets, Inc. (HMI); Specialized Association Services (SAS); Robert Hughes, president of NASE and a member of its board of directors; and HealthMarkets Lead Marketing Group, Inc (HMLMG, formerly known and sued in this complaint as UICI Marketing, Inc. (UICIM)).

[2] Demurrers were filed by Wilson, a licensed insurance agent; Mega, the insurer issuing the health policy; NASE, the association Wilson said he represented; and Phil Quinn, Quinn Division, David Mack, and Mack Region (collectively, Quinn and Mack defendants), licensed insurance agents and insurance agencies.

Dietz underwent several surgical procedures in December 2004. Mega paid "little to nothing" of Dietz's medical bills, claiming the policy did not cover most of the treatment or the policy limits had been exhausted. "It was at this time that Plaintiff came to understand that the Mega policy was not comprehensive health insurance, as Defendant Wilson had represented," but was, instead, an indemnity plan.

Dietz filed a lengthy complaint for damages on May 25, 2007. In paragraph one, she alleged that Wilson and the Quinn and Mack defendants were independent contractors or corporations, not employees of any other defendant. In paragraph four she alleged all defendants "were the agents, servants, employees, joint venturers, and/or alter egos of their co-defendants" and acted at all times "within the course, scope and authority of said agency, employment, venture and alter ego relationship." She added that each defendant, "when acting as a principal, was negligent in the selection, hiring, acquiring, and/or creating of each and every other [d]efendant as an agent, employee, joint venturer, and/or alter ego."

In paragraph 18, Dietz alleged on information and belief that all defendants were "under common control and ownership, and operate[d] as a unified business arrangement" known as the "'association method' of marketing individually written health insurance policies." Under this arrangement, "NASE permits its name to be used by insurance agents, and for said insurance agents to act as its 'representatives' and/or 'enrollees,' in the presentation of the benefits of membership in NASE, but whose primary purpose is to sell the subject Mega health insurance policies, including the 'Health Choice Advantage Benefit Plan' [the Subject Policy]."

Dietz contended in paragraphs 19 and 20 that "NASE representatives misrepresent the Mega policy as 'group insurance' only available to NASE members and obtained by Defendant NASE at significant savings because of that Association's 'group buying power.'" In truth, Dietz added, Mega is not "a carefully selected insurance company," but one whose "selection . . . is imposed upon NASE by virtue of contractual and other institutional mechanisms inherent in its relationship with" other defendants.

In paragraphs 22 and 23, Dietz alleged that NASE exists not to benefit its members, but to maximize the profits of the other defendants by selling essentially worthless health insurance. On information and belief, Dietz contended all the defendants except Hughes were involved in recruiting and training "hundreds of agents nationwide" to market NASE membership and Mega policies based on a "centrally controlled training program" that was "designed by . . . Health Markets, Mega, NASE, SAS, [and] UICIM." Wilson was dependent on Mega, the Quinn and Mack defendants, HealthMarkets, SAS and UICIM for sales leads and commission payments.

The complaint included eight causes of action.[3] In the first, Dietz sued Hughes and NASE for breach of fiduciary duty. She alleged NASE breached a fiduciary duty to ensure she was offered an appropriate health insurance policy.

The second cause of action for fraud named all defendants. There, Dietz alleged the following affirmative misrepresentations by Wilson: the Subject Policy provided comprehensive medical health coverage and NASE provided its members with "significant savings" and "unparalleled coverage" on health insurance. She alleged Wilson concealed significant terms of the Subject Policy, the Subject Policy did not provide comprehensive coverage, and NASE did not "independently review health insurance policies to determine which policy is best suited for NASE members."

The third cause of action for negligent misrepresentation was also against all defendants. It incorporated the allegations of the fraud cause of action; the few additional allegations concerned only omissions and failures to advise (e.g., that there was a $30,000 limit on "'miscellaneous hospital expenses'" for any admission).

In the fourth cause of action, again against all defendants, Dietz alleged a civil conspiracy. She contended all defendants were "aware that the others planned to misrepresent Mega policies to customers, who included the Plaintiff" and failed to

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3 The eighth cause of action sought damages for violation of the Consumer Legal Remedies Act. Plaintiff does not challenge the trial court's dismissal of this cause of action. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

disclose in sales presentations that the policies they sold did not provide comprehensive health coverage.

Wilson was the only defendant named in the fifth cause of action for professional negligence. Plaintiff contended he breached a duty to disclose "true facts about the Subject Policy" and failed to provide the type of coverage she requested.

All defendants except Wilson, Quinn, and Mack were named in the sixth cause of action for negligence. The allegations there were that each defendant "owed Plaintiff a duty to disclose the true facts about the Subject Policy" and "breached this duty by failing to accurately describe the policy terms, its limitations and that it is an indemnity plan."

The seventh cause of action for infliction of emotional distress sought damages against all defendants based on the intentional, "fraudulent, unfair, unconscionable and illegal conduct" alleged in the previous causes of action.

Out-of-state defendants HMI, SAS, HMLMG, and Hughes moved to quash service of Dietz's summons and complaint for lack of personal jurisdiction. The trial court granted those motions. It also denied Dietz's request for continuances to conduct jurisdictional discovery as to HMI, and ruled that a similar request as to SAS was moot.

Wilson, NASE, Mega, and the Quinn and Mack defendants filed motions to strike and general demurrers to the complaint. The trial court sustained the demurrers without leave to amend, deemed the motions to strike moot, and dismissed Dietz's complaint with prejudice. Dietz elected to proceed by way of appendix; there is no clerk's transcript.[4]

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[4] The parties disagree as to whether plaintiff waived the right to amend her complaint. As a plaintiff may raise this issue for the first time on appeal, we do not find a waiver. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 796.) If we conclude there is a reasonable possibility that Dietz can amend the complaint, we will reverse and remand for that purpose.

DISCUSSION

I. Motions to Quash and Denial of Leave for Continuance to Conduct Jurisdictional Discovery[5]

A California court may exercise personal jurisdiction over a nonresident defendant to the fullest extent allowed under the state and federal Constitutions. (Code Civ. Proc., § 410.10.) "A court may exercise specific jurisdiction over a nonresident defendant only if: (1) 'the defendant has purposefully availed himself or herself of forum benefits' [citation]; (2) 'the "controversy is related to or 'arises out of' [the] defendant's contacts with the forum"' [citation]; and (3) '"the assertion of personal jurisdiction would comport with 'fair play and substantial justice'"' [citation]." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.)

"A plaintiff is generally entitled to conduct discovery on a jurisdictional issue before the trial court grants a motion to quash." (*Thomson v. Anderson* (2003) 113 Cal.App.4th 258, 271.) "In order to prevail on a motion for a continuance for jurisdictional discovery, the plaintiff should demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction." (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 127.)

"The granting of a continuance for discovery lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse." (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487.) As the Supreme Court explained in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478- 479, "[t]he appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."

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5 Dietz does not challenge the trial court's orders granting the motions to quash filed by HMLMG and Hughes. We consider this a waiver and affirm the dismissal of her complaint against these two defendants. (*Tiernan v. Trustees of Cal. State University & Colleges, supra,* 33 Cal.3d at p. 216, fn. 4.)

On appeal from the HMI ruling, Dietz has simply concluded she "did an outstanding job of demonstrating why jurisdictional discovery was likely to bear fruit" and the trial court, accordingly, "abused its discretion when it rejected the plaintiff's request for jurisdictional discovery." In granting HMI's motion to quash, however, the trial court also sustained HMI's objections to the evidence plaintiff presented in support of jurisdiction.[6] As plaintiff presented no admissible evidence to support her request for a continuance to conduct jurisdictional discovery, the court did not abuse its discretion in denying a continuance.

The trial court did not reach the merits of plaintiff's request to conduct jurisdictional discovery as to SAS. Instead, the court ruled the request was moot because the only basis for holding SAS liable was its relationship with NASE, and the trial court had already granted NASE's demurrer without leave to amend.

As discussed below, we conclude that Dietz should be given leave to amend as to NASE. Accordingly, the judgment in SAS's favor must be reversed and the matter remanded to the trial court to rule on the merits of plaintiff's request in the first instance.

II. Demurrers to the Complaint

The other seven defendants filed demurrers to the original complaint, contending each cause of action failed to allege facts sufficient to state a claim. (Code Civ. Proc., § 430,10, subd. (e).) Relying on *Hadland v. NN Investors Life Ins. Co.* (1994) 24

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[6] The order states, "The only evidence presented by plaintiff to support the imposition of jurisdiction (whether general or specific) by this court upon HMI consists of an ad that was published two years after plaintiff's claims accrued, unauthenticated copies of web pages, the point of which is not entirely clear, SEC filings, a declaration from another case, and deposition testimony by two witnesses in an action entitled *Henderson v. UICI et al*., Case No. 69478 (Nevada City Superior Court) March 2, 2006. (See Exhibits 1 – 13.) (The court notes that the complaint is unverified.) HMI's objections to these exhibits are well taken. As a result, plaintiff presents no admissible competent evidence demonstrating sufficient contacts with California."

Cal.App.4th 1578, defendants argued Dietz did not and could not allege justifiable reliance on Wilson's sales presentation as she had a duty to read the Subject Policy. Additionally, all defendants successfully challenged the cause of action for intentional infliction of emotional distress and NASE prevailed on its demurrer to the cause of action for breach of fiduciary duty.

A. Standard of Review

We accept the allegations in the complaint as true (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126).[7] We review the pleading *de novo* to determine whether plaintiff has stated a cause of action under any legal theory against any defendant, "regardless of the title under which the factual basis for relief is stated." (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Further, when the trial court sustains demurrers without leave to amend, "the question on appeal (whether or not the plaintiff asked to amend the complaint) will be whether the trial court abused its discretion." (*CAMSI IV v. Hunter Tech. Corp*. (1991) 230 Cal.App.3d 1525, 1538.) If there is a reasonable possibility that defects in a complaint can be cured by amendment, then there has been an abuse of discretion. Plaintiff has the burden to demonstrate how the complaint might be amended. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff may make this showing for the first time on appeal.[8] (*Ochs v. PacifiCare of California*, *supra*, 115 Cal.App.4th at p. 796.) "Plaintiff's burden" should be relaxed where the plaintiff has had no previous opportunity to propose an amendment. (*CAMSI IV*, *supra*, at p. 1539.)

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[7] The allegations of each previous cause of action were incorporated by reference into the succeeding causes of action.

[8] Defendants argue plaintiff waived her right to amend in the trial court, but we cannot find a waiver in the record before us.

B. Breach of Fiduciary Duty against NASE[9]

The elements of a cause of action for breach of fiduciary duty are "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any one of these elements is fatal to the cause of action." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) In the commercial context, "before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. [Citations.] [¶] The relationship of seller to buyer is not one ordinarily vested with fiduciary obligation, even though sellers routinely make representations concerning their product . . . ." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221-222, superseded by statute as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

Plaintiff concedes she has not pleaded the breach of fiduciary duty claim with specificity. Citing *CDM Investors v. Travelers Casualty & Surety Co.* (2006) 139 Cal.App.4th 1251, 1256, she maintains, however, she merely has to "demonstrate that 'the complaint, liberally construed, contain[ed] facts sufficient to entitle plaintiff to any relief.'" The only pleaded facts in support of the existence of a fiduciary duty by NASE are: "[p]laintiff was a dues paying member of NASE at the time that she suffered the injuries alleged herein" and NASE failed to "exercise such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances in selecting an insurance company to provide health insurance to [its] members." Plaintiff also contends NASE is controlled by other defendants "to market individually written health insurance policies" and "[r]ecognition of the privilege of the separate existence of Defendant NASE would promote injustice because [other defendants] dominate and control . . . NASE as a mere shell, instrumentality and conduit for the purpose of committing a fraud against consumers." These allegations are insufficient to state a cause of action against NASE for breach of fiduciary duty.

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9 NASE is the only remaining defendant named in this cause of action as Hughes' motion to quash was granted.

Moreover, there is no "'reasonable possibility'" the pleading can be amended to state a cause of action for breach of fiduciary duty. Accordingly, the trial court did not abuse its discretion in denying Dietz leave to amend on this theory of liability. (*CAMSI IV v. Hunter Tech. Corp*., *supra*, 230 Cal.App.3d at pp. 1538-1539.)

C. Fraud

Although not clearly denominated as such, Dietz sought damages based on fraud, fraudulent concealment, and negligent misrepresentation.[10] The elements for fraud actions are: "'(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

The Supreme Court observed decades ago that a "fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance thereon. [Citations.] It must appear, however, not only that the plaintiff acted in reliance on the misrepresentation but that he was justified in his reliance. [Citations.] He may not justifiably rely upon mere statements of opinion, including legal conclusions drawn from a true state of facts [citations], unless the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust. [Citations.] If, however, the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation. [Citations.] Negligence on the part of the plaintiff in failing to discover the falsity of a

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[10] "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.'" (*Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 407.) A cause of action for negligent misrepresentation requires "a 'positive assertion' . . . . An 'implied' assertion or representation is not enough." (*Wilson v. Century 21 Great W. Realty* (1993) 15 Cal.App.4th 298, 305.)

statement is no defense when the misrepresentation was intentional rather than negligent. . . . The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 414-415.)

Normally, justifiable reliance is a question of fact. It may become a question of law, however, "'if reasonable minds can come to only one conclusion based on the facts.'" (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1239.) The pleaded facts here are that Dietz was specific in her requirements for a health insurance policy and received assurances from Wilson that the Subject Policy would meet those needs. In making the assurances, Wilson knowingly misrepresented the terms of the Subject Policy, as he was trained to do by NASE, Mega, SAS, Health Markets, and UICIM in order to sell the Subject Policy. Dietz reasonably relied on those misrepresentations, purchased a basically worthless heath insurance policy, and suffered damages.

Dietz did not reveal in the complaint whether she received a copy of the Subject Policy, much less that she did or did not read it.[11] Nonetheless, at the urging of the demurring defendants, the trial court concluded, "Plaintiff does not, and is unable to, allege justifiable reliance and causation in her fraud and negligence causes of action, as she had a duty to read the subject insurance contract and alleges that Wilson misrepresented the insurance contract to her. (Complaint ¶¶ 25-30); *Hadland v. NN Investors Life Ins. Co.* [*supra*] 24 Cal.App.4th at p. 1586. That is, Plaintiff is alleging that the insurance she purchased is not comprehensive as she had originally thought based on Wilson's misrepresentations, and not that Wilson was part of a conspiracy not to pay Plaintiff's claim in violation of the insurance contract."

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11 In opposition to Mega's demurrer, Dietz suggested she received the Certificate for the Subject Policy "on or around May 18, 2004." But this assertion is outside the complaint and not properly considered by this court in our *de novo* review of the complaint.

Hadland, however, was not a pleading case. Jury trial in the *Hadland* case began on the first amended complaint, which alleged eight causes of action, including fraud.[12] Plaintiffs presented their fraud evidence at trial and admitted they did not read the insurance policy, the terms of which were at odds with the agent's representations. Defendants successfully moved for nonsuit on the fraud cause of action after plaintiffs' case-in-chief, arguing plaintiffs failed to present enough evidence to take that theory of liability to the jury. The trial court applied the "general rule" that insureds are bound by the terms of an insurance policy even if they do not read it and concluded plaintiffs failed to establish justifiable reliance as a matter of law. (*Hadland, supra*, 24 Cal.App.4th at p. 1586.)

Hadland provides no support for the notion that a plaintiff must plead an exception to the general rule in order to overcome a general demurrer. Defendants have not provided this court with any authority to support that proposition, nor have we found any. Rather, on appeal from a dismissal after demurrers have been sustained without leave to amend, the appellate court is "not concerned with a plaintiff's possible inability to prove the claims made in the complaint at trial." (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.)

Moreover, "the issue whether an insured has a duty to read his policy and whether in not reading his policy he is, nonetheless, bound by its terms, is a complex one and not one that can be stated baldly without an analysis of the surrounding facts." (*Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1104.) In this case, the surrounding facts have yet to be presented. And, while Dietz will have to prove justifiable reliance to recover damages, at this stage, she can plead that element without addressing a duty to have read the Subject Policy.

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12 In *Hadland*, plaintiffs were given leave to file a second amended complaint at the start of trial to add a ninth cause of action under the Insurance Code. A jury awarded damages only on the new cause of action; the Court of Appeal reversed. (*Hadland, supra*, 24 Cal.App.4th at p. 1582.)

D. Leave to Amend to Seek Damages Based on Fraud

Although Wilson is the only defendant with whom Dietz had direct contact, we cannot rule out the reasonable possibility that Dietz may be able to plead facts to support fraud allegations against Mega, NASE, and SAS on the basis Wilson acted as their authorized agent: Plaintiff has alleged Wilson told her he was a NASE representative. She has further alleged that Wilson was a Mega sales agent who was trained to "misrepresent Mega products and NASE to customers." She alleged more generally that the training program was designed by Mega, NASE and SAS.

E. Civil Conspiracy

It is also possible that Dietz may be able to plead facts to support fraud allegations against Mega, NASE, SAS, and the Quinn and Mack defendants based on a civil conspiracy theory. Dietz has not alleged a direct relationship with any defendant except Wilson. She has not alleged that Mega, NASE, SAS, and the Quinn and Mack defendants are directly liable to her for Wilson's statements. Nonetheless, as Witkin has explained, "if A alone made representations, the plaintiff can hold B and C liable with A only by alleging and proving that A acted pursuant to an agreement (conspiracy) with B and C to defraud. Thus, the purpose of the allegation is to establish the liability of B and C as joint tortfeasors regardless of whether either was a direct participant in the wrongful act." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 921, p. 336.)

There is no separate cause of action for civil conspiracy. Rather it is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) A civil conspiracy requires knowledge of, and agreement with, a plan to engage in tortious conduct and resulting damages. "'[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or

not he was a direct actor and regardless of the degree of his activity.'" (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.)

In order to hold defendants liable as coconspirators, "a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* [*supra*] 19 Cal.4th 26, 47.)" (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.) Knowledge of the planned wrongdoing is not enough, the conspiring defendants must also "agree – expressly or tacitly – to achieve it." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.)

"'Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at p. 512, fn. 4.) However, agents who act "'as individuals for their individual advantage'" and "in furtherance of their own financial gain," may be liable to the plaintiff on a conspiracy theory. (*Doctors' Co. v. Superior Court*, *supra*, 49 Cal.3d at p. 47.)

Similarly, as a general rule, liability on a civil conspiracy theory attaches only if the alleged coconspirators owe plaintiff a duty and do not enjoy any immunity. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at p. 514.) However, an exception to the duty rule may arise when a conspiring defendant "acts in furtherance of its own financial gain." (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1048.)

In her complaint, Dietz seized on the language in *Doctors' Co.* and *Mosier* and alleged in paragraph 67 that Wilson, Mega, NASE, and the Quinn and Mack defendants "were each aware that the others planned to misrepresent Mega policies to customers, who included the Plaintiff, and cooperated in this misrepresentation in furtherance of their own financial gain." In paragraph 69, Dietz reiterated, "The Defendants acted in furtherance of their own financial gain by cooperating to defraud Plaintiff and thereby

induce Plaintiff to purchase the Subject Policy." These allegations, however, are conclusions, not facts.[13] They are insufficient to withstand a demurrer.

So, too, are the allegations of common ownership and a common scheme to train insurance agents to employ fraudulent sales techniques designed to induce small business owners to buy worthless health coverage. No facts were alleged to suggest defendants had any knowledge of Dietz or were involved in any way in providing Wilson with the lead to Dietz. No facts were alleged that defendants agreed to engage in any activity to harm Dietz or owed her any duty of care.

When all is said and done, plaintiff alleged she relied to her detriment on the misrepresentations and omissions of the only defendant with whom she had contact, Wilson, who told her the Mega policy provided the comprehensive health coverage she demanded. These allegations against the other demurring defendants were not sufficient to withstand demurrer. But we cannot rule out a reasonable possibility that Dietz may be able to amend to cure these defects. It was an abuse of discretion to refuse her that opportunity. (*CAMSI IV v. Hunter Tech. Corp.*, *supra*, 230 Cal.App.3d at p. 1539.)

F. Negligence

1. Wilson

As a general rule, an insurance agent does not owe the insured a duty to recommend a policy that provides adequate coverage. (*Paper Savers, Inc. v. Nacsa*, *supra*, 51 Cal.App.4th 1090, 1095-1096.) Exceptions to this rule exist: "In addition to an express agreement to ensure adequate coverage or a holding out by the agent to assume a greater duty toward an insured, an insurance agent may also assume a greater duty toward his insured by misrepresenting the policy's terms or extent of coverage." (*Id.* at pp. 1096-1097.)

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13 These allegations are also somewhat contradicted by the conclusory allegation that Wilson's sales presentation to Dietz was "subject to complete control" by the other defendants. (See, e.g., *Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6, fn. 3.)

At this stage, we accept as true Dietz's allegations that she told Wilson she wanted "comprehensive" medical coverage for her family so she would not "be faced with medical bills [as] a single mom" and that she purchased the Mega policy based on Wilson's sales presentation, where he misrepresented the nature and extent of Mega's coverage and concealed information concerning the relationship between Mega, NASE, and the other defendants. We also accept as true the allegations that Wilson, acting as a NASE representative and Mega sales agent, presented a controlled sales presentation designed by NASE and Mega to mislead Dietz. These allegations are sufficient to plead a breach of duty by Wilson to provide the insurance coverage plaintiff specifically requested, proximately causing her damages. At this stage, Wilson "must be deemed to have assumed additional duties, which, if breached, could subject them to liability." (*Free v. Republic Ins. Co*. (1992) 8 Cal.App.4th 1726, 1730; see also *Desai v. Farmers Insurance Exchange*, *supra*, 47 Cal.App.4th at p. 1119 ["A 'failure to deliver the agreed-upon coverage' case is actionable, unlike the 'failure to recommend' cases cited by Farmers."].)

Additionally, the demurrer could not be sustained based on the two-year statute of limitations for negligence. (Code Civ. Proc., § 335.1.) Defendants contend Dietz's claims began to accrue as early as May 2004, when she purchased the policy, but no later than December 2004, when she underwent surgery. Under either date, they claim the May 2007 lawsuit seeking damages for negligence is too late.

For "the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred." (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) Dietz's complaint did not "clearly and affirmatively" show that her negligence claim was time barred, and thus Dietz did not have the burden of alleging facts that would toll the statute of limitations. Dietz did not allege that she was aware of the policy's coverage limits in May 2004, when she received the insurance certificate. And as discussed above, Dietz was under no duty to read the insurance certificate given Wilson's affirmative misrepresentations about the nature of

the policy. Even though Dietz alleged that she underwent surgery in December 2004, she alleged in a separate paragraph that it was only when Mega "paid little to nothing" of her medical bills did she learn that the policy she purchased as a result of Wilson's statements did not provide the level of coverage promised. It is possible Mega rejected her claim sometime after May 2005. While defendant's statute of limitations defense may be successful at a later stage, we cannot say on review of Wilson's demurrer to the negligence cause of action that a "defect . . . clearly and affirmatively appear[s] on the face of the complaint." (*Marshall, supra*, 37 Cal.App.4th at p. 1403.)

Plaintiff stated facts sufficient to constitute a cause of action for negligence against Wilson. The trial court erred in sustaining his demurrer.

2. Mega

Dietz did not state facts sufficient to constitute a cause of action for negligence against Mega. But again, we cannot eliminate the reasonable possibility that she may be able to amend the pleading. An insurer that directs or authorizes its agent to engage in tortious conduct or that ratifies its agent's tortious acts may be vicariously liable for the agent's negligence. (*Desai v. Farmers Insurance Exchange*, *supra*, 47 Cal.App.4th at pp. 1118-1119.)

3. NASE, Quinn Division and Mack Region

Dietz attempts to hold these three defendants liable for negligence under "the doctrine of conspiracy." A conspiracy by definition requires intentional agreement to commit or achieve a specific outcome. Accordingly, parties cannot intentionally agree to fail to exercise due care, i.e., to act negligently. (*Koehler v. Pulvers* (S.D. Cal. 1985) 606 F.Supp. 164, 173 ["This court is unaware of California decisional law imposing liability for conspiring to commit negligence. The allegation of civil conspiracy appears inherently inconsistent with the allegation of an underlying act of negligence"]; *Sonnenreich v. Philip Morris Inc*. (S.D. Fla. 1996) 929 F.Supp. 416, 419-420 [because "it is impossible to conspire to act negligently . . . . [l]ogic and case law dictate that a conspiracy to commit negligence is a non sequitur"]; *Triplex Comm. v. Riley* (Tex.1995)

900 S.W.2d 716, 719, fn. 2 [“Given the requirement of specific intent, parties cannot engage in a civil conspiracy to be negligent”].)

For these reasons, Dietz did not and cannot allege a cause of action for negligence against NASE, Quinn Division, or Mack Region based on a civil conspiracy theory.

G. Intentional Infliction of Emotional Distress

The elements of cause of action for “intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; (3) and actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” (*Cervantez v. J. C. Penney Co*. (1979) 24 Cal.3d 579, 593.) In the seventh cause of action, which incorporated all previous allegations, Dietz reiterated this language and concluded that the “fraudulent, unfair, unconscionable and illegal conduct of the Defendants, and each of them, as hereinbefore alleged, constitutes extreme and outrageous conduct” and was “done with intent to cause or with reckless disregard for the inevitability of causing extreme and severe emotional distress.” The facts upon which she sought recovery for this tort are the same as those in the fraud cause of action. However, if a “claim for emotional distress is based on the same conduct alleged to show fraud, no recovery is permitted. Emotional distress is not recoverable as an element of damages for fraud.” (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 67.) The demurrer to this cause of action was properly sustained and Dietz has not demonstrated how an amendment would change the legal effect of her pleading.

DISPOSITION

We affirm the trial court's dismissal of defendants HMI, HMLMG, and Hughes. The trial court did not rule on Dietz's request to conduct jurisdictional discovery as to SAS, and we return the matter to the trial court for proceedings consistent with this opinion.

The trial court properly sustained the demurrers without leave to amend to the causes of action for breach of fiduciary duty, intentional infliction of emotional distress, and violation of the Consumer Legal Remedies Act. Dietz alleged sufficient facts against Wilson to proceed with a fraud action. There is a reasonable possibility that she can amend to seek damages based on fraud as to NASE, Mega, and the Quinn and Mack defendants, and the matter is remanded to the trial court for that purpose. Similarly, Dietz alleged sufficient facts against Wilson to proceed on a negligence theory. She may be able to amend to allege a negligence cause of action against Mega as well. The trial court properly sustained without leave to amend demurrers by NASE and the Quinn and Mack defendants to the negligence cause of action.

Defendants HMI, HMLMG, and Hughes are entitled to costs on appeal. Otherwise, the parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

DUNNING, J.*

We concur:

TURNER, P. J. KRIEGLER, J.

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.